

**Editor's note: Reconsideration denied by Order dated Feb. 11, 1987**

RICHARD D. AND VIRGINIA TROON  
ALAN AND JUDITH A. GALLION

IBLA 85-274

Decided August 27, 1986

Appeal from a dismissal of a protest against a public land sale of a tract by modified competitive bidding procedure. OR 37197.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Sales --  
Public Sales: Preference Rights

Under sec. 203(f) of FLPMA, 43 U.S.C. 1713(f) (1982), and 43 CFR 2711.3-2, the Bureau of Land Management is authorized to offer land for sale by a modified competitive bidding procedure which adequately accommodates the preference rights of the adjacent landowners where they all have an equal opportunity to submit sealed bids for a small parcel that does not lend itself to a division among the adjoining landowners and the record does not support a direct sale to any one of the preference bidders.

2. Federal Land Policy and Management Act of 1976: Sales --  
Public Sales: Generally

Where the regulations in 43 CFR 2711.1-2(a) governing a notice of realty action for public sale require that a notice identifying a tract for sale be sent to parties in interest by BLM 60 days prior to the sale, and provide for a 45-day comment period, a notice not timely sent to an interested party will not negate the sale where the party asserting the deficiency had actual notice of the sale, had an opportunity to comment and participate in the sale, and was not prejudiced by BLM's failure to provide a timely notice.

APPEARANCES: Steven W. Abel, Esq., Portland, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Richard D. Troon, Virginia Troon, Alan Gallion, and Judith A. Gallion have appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated January 2, 1986, which rejected the Troons' high bid for lot 1, sec. 31, T. 37 S., R. 4 W., Willamette Meridian, Jackson County,

Oregon, at a public sale held in the Medford District Office on December 5, 1984. <sup>1/</sup> The decision also dismissed the Troons' protest to the sale of this tract to the next high bidder, Charles W. Sears.

The following sequence of events sets out the pertinent background for our consideration of the appeal of the sale in question. Lot 1 was originally offered for public sale by means of a modified competitive bidding procedure with the use of sealed bids pursuant to section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1982). The lot was offered for sale with a minimum bid at the fair market value of \$400 to the preference right adjoining landowners as designated bidders. Each designated bidder was given an equal opportunity to purchase at a competitive bid situation. Lot 1 was one of three isolated parcels offered at the sale on December 5, 1984, after BLM had determined such a sale of these tracts would be in the public interest because these parcels were difficult and uneconomical to manage as part of the public lands, were not suitable for management by another Federal department or agency, and, therefore, were no longer needed by the Federal Government.

The record shows that prior to the sale of lot 1, on January 10, 1984, the Troons had submitted an application for right-of-way to use and continue to maintain a road across portions of lots 1 and 3 for access to adjacent property they owned in the area. At that time the Troons were first informed of the BLM proposal to sell these lots. BLM indicated it did not wish to encumber the title to the lots with a road right-of-way, where the facts showed the width of lot 1 was 25 feet and the road would have run the entire length of lot 1. Since the parcel had already been identified for sale, BLM considered the application as being filed in error, and the cost recovery fees were refunded on June 6, 1984. The record further shows the Troons sold a parcel of approximately 28 acres to Alan and Judith A. Gallion on June 29, 1984, known as "the west property", which was the primary tract which this right-of-way was to serve. Shortly after that sale and long before the public sale of lot 1 took place, the Troons constructed a road

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<sup>1/</sup> Alan Gallion and Judith A. Gallion were not parties to the decision below. They, however, have joined in this appeal by signing appellants' brief and requesting the Board to set aside the sale of lot 1. They assert through the Troons' brief that they were adversely affected by this public sale because of their purchase of a parcel adjacent to lot 3, sec. 31, T. 37 S., R. 4 W., Willamette Meridian, on June 28, 1984, from the Troons known as "the west property." The maps of record show that this parcel does not adjoin lot 1 at any point. The Gallions were therefore never adjoining landowners to that lot, and would not have qualified for a preference right to be considered designated bidders for lot 1 at the sale. Since the Gallions cannot show a right to be included as designated bidders for lot 1, they were not entitled to a special notice of the sale of that lot. Even if they may be considered adversely affected by BLM's decision, they did not file a timely appeal. Therefore, any attempt by the Gallions to join in the Troons' appeal must be considered a late appeal and dismissed.

over portions of lot 1. Mr. Troon repeatedly contacted BLM prior to the sale to voice his objections to the method of sale through modified competitive bidding and requested the tract be sold directly to him. In those conversations with BLM personnel, Troon admitted he had already constructed the road over lot 1 to use as access to the parcel he sold to the Gallions. He noted he had spent approximately \$5,000 on the road. 2/

The notice of realty action (NORA) for the sale involving lot 1 was published in the Federal Register on October 4, 1984 (49 FR 39242), and published in a local newspaper, the Medford Mail Tribune, November 13, 20, and 27, 1984. In addition, copies of the published notice were sent to all members of the Oregon congressional delegation on October 2, 1984, and subsequently to each of the designated bidders for each tract involved. The notice specifically set out the proper sale procedures to be followed by the designated bidders pursuant to 43 CFR 2711.3-2 stating in pertinent part:

The parcels serialized as OR 37197, OR 37198 and OR 37199, will be offered for sale by sealed bids only, using modified competitive bidding procedures. Preference rights are being offered to the contiguous landowners, which have been identified as designated bidders. Bids will be accepted only from the designated bidders. To exercise the preference right, the designated bidder must submit a proper bid. Failure to submit a proper bid, at the time of sale will constitute a waiver of the preference right. No bid will be accepted for less than the appraised value.

Sealed bids must be accompanied by certified check, postal money order, bank draft, or cashier's check made payable to the Department of the Interior - BLM for not less than thirty percent (30%) of the amount bid. The sealed envelope must be clearly marked "Bid for Public Land Sales, Sale Parcel No. OR 3719 -- Jackson County, Oregon, December 5, 1984.

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Sealed bids delivered or sent by mail, must be received at the BLM, Medford District Office, 3040 Biddle Road, Medford, Oregon 97504 before 11:30 a.m., December 5, 1984.

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Detailed information concerning the sale, including the planning documents, environmental assessment, land report and fair market appraisal, is available for review at the Bureau of Land Management, Medford District Office, 3040 Biddle Road, Medford, Oregon 97504, or by calling Ward Brookwell, Area Realty Specialist, (503) 776-4274.

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2/ Memorandum to record dated Dec. 20, 1984, by Jan R. Miller, "Notes on Mr. Troon's Protest of Public Sale OR 37197."

For a period of 45 days from the date of this notice, interested parties may submit comments regarding the proposed action. Comments shall reference Serial Numbers of the parcels. Any adverse comments will be evaluated by the District Manager who may vacate or modify this realty action and issue a final determination. In the absence of any action by the District Manager, this realty action will become the final determination of the Department of the Interior.

Three sealed bids were timely filed for lot 1, one from each of the designated bidders. The Troons were the apparent high bidders at \$5,000 followed by Charles W. Sears at \$3,012, and Beverly A. Saul at \$401. The Troons submitted a protest of the sale with their bid. However, the Troons submitted a personal check for \$1,500 for their bid deposit. They were told at that time it was doubtful BLM could accept a personal check because a personal check did not meet the regulatory requirements. Subsequently, at 4:13 p.m., December 5, 1984, Mrs. Troon submitted a certified check for \$1,500 accompanied by a statement from the operations officer of the Southern Oregon Federal Credit Union stating, "Misinformation was released by us, regarding a bank draft vs. a personal draft. Our member Virginia M. Troon is not at fault."

On these facts, BLM rejected the Troons' bid and declared Charles W. Sears the successful bidder for lot 1, stating:

The Bureau of Land Management cannot be held responsible for erroneous information provided by a third party.

Considering the above, the high bid submitted by Mr. and Mrs. Richard D. Troon must be rejected as the bid was not accompanied by a certified check, postal money order, bank draft or cashiers check. In addition, the certified check submitted later in the day is not acceptable, as a proper bid was not submitted prior to 11:30 a.m., December 5, 1984.

Further, BLM dismissed the Troons' protest as being untimely submitted, concluding:

The Notice of Realty Action published in the Federal Register on October 4, 1984, stated "For a period of 45 days from the date of this notice, interested parties may submit comments regarding the proposed action." The protest was not received in the specified time, so cannot be considered. Considering the above the protest must be dismissed.

The Troons have appealed the rejection of their protest of the sale of lot 1 to Charles W. Sears, stating:

The procedure under which the sale of Lot 1, Serial No. OR 39197, was held did not meet with statutory and regulatory

obligations under which the BLM is obligated to operate. Specifically, the BLM failed to provide proper notices to parties of interest, prejudicing the rights of appellants to comment on the form of sale and hindering appellants' efforts to prepare for the sale. Further, BLM abused its discretion by failing to identify and name as bidders appropriate parties in interest and by failing to recognize the historical uses of the parcel in question and by failing to use that information to tailor a sale program which would uphold the existing and historical uses of the property.

Statement of Reasons 1. They contend, inter alia, the notice of sale was materially defective because they did not receive their copy of the notice until November 20, 1984. Since the sale was held on December 5, 1984, appellants assert BLM did not comply with the requirements of 43 CFR 2711.1-2(a) which provide that a NORA shall be sent to parties in interest 60 days prior to the sale and shall provide 45 days after its issuance for the right of comment.

[1] BLM is authorized to offer land for public sale if the land meets the disposal criteria established under section 203(a) of FLPMA, 43 U.S.C. 1713(f) which provides in part that lands may be sold if the Secretary determines the following:

- (1) such tract because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands, and is not suitable for management by another Federal department or agency; or
- (2) such tract was acquired for a specific purpose and the tract is no longer required for that or any other Federal purpose[.]

Under section 203(f) of FLPMA, 43 U.S.C. 1713(f) (1982), BLM is authorized to utilize a modified competitive bidding procedure to sell such land if BLM determines "it is necessary and proper in order to . . . recognize equitable considerations or public policies, including but not limited to a preference to users . . . ." Under prior legislation, Congress had given such a preference right to adjacent landowners 3/ and, by providing for modification of competitive bidding in favor of adjacent landowners under section 203(f) of FLPMA, Congress made clear that the new legislation was not intended to abrogate the prior policy favoring such preference rights. Luther P. Moss, 89 IBLA 171 (1985).

Accordingly, there is ample authority for BLM to use a modified competitive bidding process to sell land and still accommodate the preference rights

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3/ In section 14 of the Act of June 28, 1934, 48 Stat. 1274, Congress amended legislation authorizing sales of certain land to provide that "owners

of adjacent landowners where BLM determines that procedure is appropriate and justified by the circumstances.

In the case at hand, the record supports BLM's use of that method of sale. The Environmental Assessment Report (EAR) prepared by BLM on October 2, 1984, clearly substantiates the proposal to sell this tract in conjunction with the other two lots in the sale because they were all closely related and connected in part and of no particular value for any BLM program. As to the history of lot 1, the report specifically states:

Lot 1 of Section 31 which contains 0.78 acres is bounded on the east by private property and is approximately 22 feet wide at that point. The tract is further bounded on the north by private property owned by Melvin Saul for the complete distance of 1,320 feet more or less. Melvin Saul and his predecessors have used portions of Lot 1 along with his own property for grazing and other related uses for at least the last 100 years or so. The fence separating his property from that of his neighbor, Mr. Charles Troon, actually cuts Lot 1 in two separate pieces lengthwise. Lot 1 has never [been] segregated from the adjacent private property. Until just recently, the county records never acknowledged the presence of the government-owned Lot 1, but showed only the private parcels. This has been recently corrected.

Mr. Troon's use of Lot 1 goes back an equal amount of time. Actually, on the east end of Lot 1, Mr. Troon's property line should be located some five feet south of the fence as now located with the other 17-foot portion of the government-owned lot being located north of the fence on Mr. Saul's side of the fence. In all, Mr. Troon's use of Lot 1 extends approximately 990 feet to the west to his northwest property corner. The west end of Lot 1 is enclosed by fences along the north and south edges. The west portion of Lot 1 is actually a fenced lane between Mr. Troon's grape vineyard and Mr. Troon's west field which is located behind or immediately west of the south portion of Lot 3. It appears that the north side of Mr. Troon's grape vineyard encroaches into the southern edge of Lot 1. The east end of Lot 1 appears to have been used for pasturage -- both by Mr. Saul and Mr. Troon.

The narrowness of Lot 1 will preclude any use of this lot for residential purposes. Also, the acreage available in Lot 1 (0.78 acres) will also preclude residential use of the lot as well. While Lot 1 is O&C land, Lot 1 is definitely not timber

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fn. 3 (continued)

of contiguous land shall have a preference right to buy the offered lands at such highest bid price." This legislation remained in effect until repealed by section 703(a) of FLPMA, P.L. 94-579, 90 Stat. 2790.

land. Its highest and best use is for agricultural related uses only -- the same uses that have taken place in this parcel for the last 100 years or so.

(EAR at 2-3). The report concludes that if BLM transfers these three tracts to private ownership, it will end a very long history of unauthorized uses by adjacent landowners (EAR at 5). It also lists appellant Richard Troon among those persons or organizations contacted for input to the report (EAR at 6).

[2] Appellants rely heavily on the alleged technical deficiencies in the NORA they received, asserting, inter alia, that as interested parties, they were deprived of sufficient time to make their comments on the sale. We agree that as adjacent landowners to lot 1 and as designated bidders for that tract in the NORA, they were clearly parties of interest, and as such were entitled to receive the notice 60 days prior to the sale and to be allowed 45 days to comment on the sale. 43 CFR 2711.1-2(a). 4/ The Troons have alleged, and BLM has not denied, that they did not in fact receive such notice in the mail until November 20, 1984. Thus, while the NORA itself was not substantively deficient, there was a failure to provide appellants the 60-day notice and 45-day comment period required by 43 CFR 2711.1-2(a). However, appellants cannot be heard to complain regarding the lack of required notice, insofar as it relates to the sale itself. The Troons had repeated contacts with BLM as to the disposition of the land beginning with BLM's refusal to accept their right-of-way application in June of 1984 for the very reason the land was to be sold at a later date. BLM provided general notice to the public of the sale with the publication in the Federal Register and in the local newspaper, and appellants cannot deny they were aware of the material details of the sale. Mr. Troon came to the BLM office before the sale and voiced his opposition to sale of the land by competitive bid, instead of direct sale to him. Moreover, appellants were still able to file a substantive protest with their sealed bid at the sale. Appellants cannot credibly argue that they did not have actual notice of the terms of the public sale, or that they were prejudiced in their efforts to try to effect a change in the sale procedures. The record verifies their active participation in the sale process and their attempts to alter that process. Under these circumstances, the claim that the notice of sale was deficient cannot constitute a basis for negating the sale. See Village & City Council of Aleknagik (On Reconsideration), 80 IBLA 221 (1984). See also Santa Fe Pacific Railroad, 90 IBLA 200, 219 (1986).

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4/ Section 2711.1-2(a), Notice of realty action, states:

"A notice of realty action offering for sale a tract or tracts of public lands identified for disposal by sale shall be issued, published and sent to parties of interest by the authorized officer not less than 60 days prior to the sale. The notice shall include the terms, covenants, conditions and reservations which are to be included in the conveyance document and the method of sale. The notice shall also provide 45 days after the date of issuance for the right of comment by the public and interested parties."

However, the protest originally submitted by the Troons on December 5, 1984, was improperly dismissed by BLM as untimely. <sup>5/</sup> Under 43 CFR 4.450-2, a protest is any objection to any action proposed to be taken by BLM. In this case the proposed action was the sale. The 45-day comment period set forth in the NORA did not restrict the Troons' right to protest under 43 CFR 4.450-2 and to subsequently file an appeal. See Steinheimer Trust, 87 IBLA 308, 309-10 (1985).

Thus, we conclude BLM should have considered the merits of the Troons' protest in its decision. We need not return the case to BLM for consideration of the protest, however, because the record shows that on December 20, 1984, BLM did, in fact, consider the merits of the objections raised. <sup>6/</sup> We find that record document to be responsive to those objections.

We turn now to the other arguments raised by appellants on appeal. Appellants also challenge the substantive factors considered by BLM in deciding to sell lot 1 competitively rather than by direct sale to them. They maintain BLM failed to recognize historical uses of the parcel. The record, however, confirms that the historical use is not clearly weighted in favor of

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<sup>5/</sup> The record indicates Richard Troon filed a protest with BLM on Dec. 5, 1984, but on Dec. 17, 1984, filed a request that it be withdrawn. On Dec. 17, 1984, a second protest was filed by Mr. Troon.

<sup>6/</sup> The document, signed by Jan R. Miller, states:

"Notes on Mr. Troon's Protest of Public Sale OR 37197.

Original Protest Received December 5, 1984

1. It does not matter how Lot 1 was created. The important fact is that it exists. It meets the criteria of lands suitable for public sale in Section 203(a)(1) of Public Law 94-579.

2. The Bureau is not in the position to decide that one adjoining owner has more preference through historical use than another.

The property lines for Lot 1 have not been re-established. In describing Lot 1 as Lot 1 we are selling it wherever it may be.

Protest Received December 17, 1984.

1. See #2 above.

2. The subject map indicates Lot 1 provides access to the county road. However, the land reports states "Lot 1 . . . is bounded on the east by private property . . .". In addition the designated bidders were aware of this fact. The land locked parcel will remain land locked whether purchased by Mr. Troon or Mr. Sears.

Troon's "west property", no longer owned by Mr. Troon, is no more land locked now than it was when Mr. Troon sold it. There is physical access but no legal access.

3. The reason Troon would be forced to remove 1/4 acre of his established vineyard is when he sold the "west property" he also included ". . . an easement for ingress and egress over the northerly 25 feet of grantors property . . ." With the road being located in Lot 1, construction on the easement granted is not required.

4. Any hardship is Mr. Troon's as he sold a parcel with no legal access. The expense to Troon is the money already spent on the road as we



one neighbor over the other. Further, appellants were given the opportunity to agree on an equitable division of the property with the other neighbors prior to the sale but no agreement was reached. With the parties unable to reach an agreement, BLM took a reasonable approach to disposal of the land that is supported by the record. Appellants have failed to establish that the sale in question is contrary to law or not supported by a rational basis in the record. 7/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

John H. Kelly  
Administrative Judge

We concur:

Bruce R. Harris  
Administrative Judge

Wm. Philip Horton  
Chief Administrative Judge

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fn. 6 (continued)

are requiring new access if needed. The expense to the government is a given for no matter what is done someone will appeal, either Mr. Troon or Mr. Sears.

5. The statements have not been identified. BLM was working with the best information we had at the time.

Mr. Troon repeatedly refers to the "adverse sale of Lot 1". By this he means to Mr. Sears. The two have been at odds for quite some time.

Mrs. Troon's application for a R/W was considered as filed in error and the cost recovery fees returned. BLM did not want to encumber the title with a R/W that would limit the sale to one person."

7/ Other arguments raised by appellant which have not been expressly addressed in this decision have been considered and found not to warrant overturning the sale.

